

**Green, LindaE**

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**From:** Mychal Ozaeta <mozaeta@earthjustice.org>  
**Sent:** Friday, May 11, 2018 3:57 PM  
**To:** FOIA HQ  
**Subject:** FOIA Request  
**Attachments:** FOIA EPA 5 11 18 state authorization.pdf

Please find attached a Freedom of Information request. Thank you.

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ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES  
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

May 11, 2018

BY EMAIL: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

FOIA Officer  
FOIA and Privacy Branch  
Office of Environmental Information  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W. (2822T)  
Washington, D.C. 20460

Re: Freedom of Information Act Request for Information Pertaining to State  
Applications for EPA Authorization of CCR Permit Programs

Dear FOIA Officer:

This is a request for information on behalf of Earthjustice and Sierra Club (collectively, "Public Interest Groups") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Environmental Protection Agency's ("EPA") FOIA regulations, 40 C.F.R. § 2.107. The Public Interest Groups hereby request a copy of all applications from states to operate coal combustion residuals ("CCR") permit programs submitted to EPA pursuant to section 2301 of the Water Infrastructure Improvements for the Nation Act ("WIIN Act") and for the responses of EPA to those applications. Specifically, the Public Interest Groups request the following documents:

- (1) A copy of all applications from states seeking full or partial EPA authorization for a CCR permit program received by EPA between September 9, 2017 and May 11, 2018;
- (2) A copy of all supporting materials accompanying any state application for a CCR permit program including, but not limited to, correspondence, memoranda, data, reports, emails, regulations, statutes or other written records; and
- (3) A copy of all records from EPA sent, emailed or communicated to a state in response to a full or partial submission described in (1), above.

For purposes of this request, the term "records" means information of any kind, including, but not limited to, documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), letters, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained.

To the extent that relevant records are available electronically, please provide these records in that format.

It is our belief that the records requested in this FOIA may be held and generated in EPA Regional Offices. To ensure a timely response to this FOIA, please direct this request to the appropriate divisions within all EPA Regional Offices.

Please be aware that FOIA requires that you respond within 20 working days of your receipt of this request, *see* 5 U.S.C. § 552(a)(6)(A)(i), and that that response must “at least indicate within the relevant time period the scope of the documents [you] will produce and the exemptions [, if any, you] will claim with respect to any withheld documents.” *Citizens for Responsibility and Ethics in Washington v. F.E.C.*, 711 F.3d 180, 182-83 (D.C. Cir. 2013).

Further, the Public Interest Groups respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. §552(a)(4)(A)(iii) and 5 C.F.R. §1303.70 because the Public Interest Groups seek this information in the public interest and will not benefit commercially from this request. If EPA does not waive the fees entirely, the Public Interest Groups request that it reduce them to the extent possible.

### **Fee Waiver Request Justification**

The Public Interest Groups are national, nonprofit, environmental organizations with no commercial interests in obtaining the requested information. Instead, the Public Interest Groups intend to use the requested information to inform the public, so the public can better understand the operations and activities of the EPA and OLEM with respect to the regulation of coal combustion residuals under the Resource Conservation and Recovery Act (RCRA).

As explained below, this FOIA request satisfies the factors listed in EPA’s governing regulations for waiver or reduction of fees, as well as the requirements of fee waiver under the FOIA statute – that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii), *see also* 40 C.F.R. § 2.107(l). The U.S. Department of Justice (DOJ) has identified six factors to assess whether a requester is entitled to a waiver of fees under FOIA, and the D.C. Circuit and other Courts of Appeals reference and apply these factors.<sup>1</sup> This request complies with each of the factors agencies weigh in a fee waiver determination, as demonstrated below:

1. The subject matter of the requested records must specifically concern identifiable “operations and activities of the government.”

The requested records relate to EPA’s regulation of CCR under RCRA. On April 17, 2015, EPA published “Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities; Final Rule,” 80 Fed. Reg. 21,302 (“CCR rule”).

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<sup>1</sup> *See, e.g.*, Stephen J. Markman, U.S. Dep’t of Justice, FOIA Update, Vol. VIII, No. 1, New Fee Waiver Policy Guidance at 3-10 (1987), available at [http://www.justice.gov/oip/foia\\_updates/Vol\\_VIII\\_1/viii1page2.htm](http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm); *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (stating that “for a request to be in the ‘public interest,’ four criteria must be satisfied,” and citing agency’s multi-factor fee waiver regulation).



The CCR rule sets forth regulations for management and disposal of CCR generated by electric utilities. In December 2016, Congress passed the WIIN Act, which provides authority to EPA to approve state CCR permit programs to operate in lieu of the CCR rule. Information concerning EPA's evaluation and approval of state CCR permit programs unquestionably involves the "identifiable operations or activities of the government."

The Department of Justice Freedom of Information Act Guide expressly concedes that "in most cases records possessed by federal agency will meet this threshold" of identifiable operations or activities of the government. There can be no question in this instance that this is the case.

2. The disclosure of the requested documents must have an informative value and be "likely to contribute to an understanding of Federal government operations or activities."

The Freedom of Information Act Guide makes it clear that, in the Department of Justice's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain. The requested records are "likely to contribute" to an understanding of your agency's decisions and EPA's operations and activities because these documents are not otherwise in the public domain and are not accessible other than through a FOIA request. Given the importance of the state CCR program authorization process and its impact on public safety and the environment, the records requested should be made available to the public. The documents requested are "meaningfully informative" and "likely to contribute" to a greater understanding of EPA's operations and activities with respect to the CCR rule and EPA's new authority to approve state CCR permit programs.

3. The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Under this factor, the identity and qualifications of the requester—i.e., expertise in the subject area of the request and ability and intention to disseminate the information to the public—is examined.

The Public Interest Groups have longstanding interests and expertise in coal ash and in the rulemaking governing coal ash disposal. More importantly, the Public Interest Groups unquestionably have the "specialized knowledge" and "ability and intention" to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the "public-at-large."

Earthjustice intends to disseminate the information they receive through this FOIA request regarding these government operations and activities in a variety of ways, including but not limited to, analysis and distribution to the media, distribution through publication and email, posting on Earthjustice's website, and list-serve distribution to members of the public interested in EPA's authorization of state coal ash permit programs. In addition, Earthjustice maintains a webpage devoted to coal ash at [www.earthjustice.org/coalash](http://www.earthjustice.org/coalash), and Earthjustice routinely uses this webpage to disseminate information.

The Sierra Club is the nation's oldest and largest grassroots environmental organization, with more than 2.7 million members and supporters, including online activists and newsletter subscribers. Its website is highly trafficked and Sierra Club media and communications reach hundreds of thousands of people through an extensive digital communications network and online information system, print magazine, radio show, web videos, and news reports.

4. The disclosure must contribute "significantly" to public understanding of government operations or activities. The public's understanding must be likely to be enhanced by the disclosure to a significant extent.

There is currently significant public concern regarding the CCR rule and EPA's duty to authorize state CCR permit programs only if they are at least as protective as the CCR rule. The rule promulgated by EPA was a self-implementing rule, and citizens have a substantial role and interest in enforcement of the rule. Information concerning changes in the public's ability to enforce the rule and in the stringency of its requirements is of substantial interest to the public. In addition, the WIIN Act guarantees a public comment period on all applications for state CCR permit programs. Disclosure of the requested records will therefore significantly enhance the public's understanding of compliance and enforcement issues and foster public participation in the EPA authorization process.

Absent disclosure of the records requested, the public will remain uninformed concerning EPA authorization of state CCR permit programs. The disclosure of the requested records is essential to public understanding of the authorization process and the impact that a CCR permit program may have on the safety of their community and environment. After disclosure of these records, the public's understanding of these issues will be significantly enhanced, and meaningful public participation in the authorization process will be fostered. The requirement that disclosure must contribute "significantly" to the public understanding is therefore met.

5. Whether the requester has a commercial interest that would be furthered by the requested disclosure.

The Public Interest Groups have no commercial interests in the requested records. The Public Interest Groups are non-profit organizations with no intention to use these records in any manner that "furthers a commercial, trade, or profit interest" as those terms are commonly understood. The Public Interest Groups are tax-exempt organizations under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, and as such have no commercial interests. The Public Interest Groups seek to use this information solely to promote safe and healthy environments for all communities and to inform the public on matters of vital importance to the environment and public health, including from the impacts of coal combustion residuals.



6. Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order to compare it to the "public interest" in disclosure. If no commercial interest exists, an assessment of that non-existent interest is not required.

As noted above, the Public Interest Groups have no commercial interests in the requested records. Disclosure of this information is not "primarily" in the commercial interests of the Public Interest Groups. On the other hand, it is clear that the disclosure of the information requested is in the public interest. It will contribute significantly to public understanding of federal and state regulation of coal combustion residuals.

The Public Interest Groups thus respectfully request, because the public will be the primary beneficiary of this requested information, that EPA waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A).

In the event that your Office denies a fee waiver, please send a written explanation for the denial but continue to produce documents until the fee reaches \$100.

Please produce the requested records on a rolling basis. At no time should the Office's search for, or deliberations concerning, any records requested herein delay the production of other records that the Office has already elected to produce.

If you regard any of the requested records to be exempt from required disclosure under FOIA, we request that you disclose them nevertheless; as such disclosure would serve the public interest of educating citizens. *See* 10 C.F.R. §1004.1 (authorizing disclosure of documents exempt from FOIA disclosure where such disclosure is in the public interest).

In addition, should you invoke a FOIA exemption regarding any of the requested records, we request that you release any segregable portions of such records that are left after the exempted material has been redacted from the records we are seeking.

Please send the requested records by email to [mozaeta@earthjustice.org](mailto:mozaeta@earthjustice.org) or, for records not available electronically, by regular mail to Mychal Ozaeta, Earthjustice, 1617 John F. Kennedy Blvd., Suite 1130, Philadelphia, PA 19103. If you find that this request is unclear in any way, please do not hesitate to contact me by phone at (215) 717-4529.

Thank you for your time and assistance. We look forward to your prompt reply.

Sincerely,

/s/ Mychal Ozaeta

Mychal Ozaeta  
Attorney  
Earthjustice  
215-717-4529  
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Submitted on behalf of:

Sierra Club